

ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**JODI KATHRYN STEIN**  
Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

VS.

STATE OF INDIANA,  
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)

No. 49A02-0801-CR-27

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Grant Hawkins, Judge  
Cause No. 49G05-9911-FC-200634

**SEPTEMBER 25, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Appellant-Defendant Kenneth Stewart appeals the trial court's imposition of a fifty-year aggregate sentence, with ten years suspended and five years on probation, after Stewart pled guilty to voluntary manslaughter, a Class A felony and carrying a handgun without a license, a Class C felony. We affirm.

## ISSUE

Stewart raises a single issue for our review, which we restate as: Whether the sentence imposed by the trial court is inappropriate.

## FACTS AND PROCEDURAL HISTORY

On February 9, 1999, Stewart and Charles Lamont Johnson were together in an Indianapolis neighborhood. Stewart became angry with Johnson and repeatedly shot him with an unlicensed handgun. Johnson died from his wounds.

The State initially charged Stewart with murder, a felony; and carrying a handgun without a license, a Class C felony. The State later amended the information to add a charge of voluntary manslaughter, a Class A felony. Stewart pled guilty to the manslaughter and the handgun charge under an agreement that left sentencing within the trial court's discretion but required concurrent sentences. At sentencing, the trial court articulated Stewart's guilty plea, hardship to Stewart's child, and Stewart's emotional problems as mitigating circumstances. The trial court also found Stewart's emotional problems constituted an aggravating circumstance. The trial court further found Stewart's extensive criminal history, his unsuccessful attempts at probation, and his jail

conduct as aggravating circumstances. The trial court sentenced Stewart to fifty years, with ten years suspended, for the manslaughter conviction and to a concurrent four years for the handgun conviction. Stewart now appeals.

### DISCUSSION AND DECISION

Stewart contends that imposition of a fifty-year aggregate sentence is inappropriate. We note that at the time the offense was committed, Ind. Code § 35-50-2-4 provided for a Class A felony a presumptive term of thirty years, with the possibility of twenty years added in aggravation. Stewart argues that the maximum possible sentence should be reserved for the “most serious offenders.” Appellant’s Brief at 11 (citing *Buchanan v. State*, 767 N.E.2d 967, 974 (Ind. 2002); *Payton v. State*, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), *trans. denied*).

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The “character of the offender” portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

The record shows, with regard to the nature of the offense, that Stewart had a verbal confrontation with Johnson, apparently over crack cocaine. Stewart then shot

Johnson eight times, causing Johnson's death. We cannot say that the nature of the offense, one involving multiple shots into the victim, militates against the imposition of the forty-year executed sentence in the present case.

With regard to the character of the offender, we note that Stewart, who was eighteen at the time he emptied his gun into Johnson, had a long juvenile history and at least five convictions as an adult. According to the trial court, Stewart's juvenile history included three battery adjudications, two resisting law enforcement adjudications, two disorderly conduct adjudications, a mischief adjudication, and a trespass adjudication. Stewart's adult criminal history included an intimidation conviction and four criminal trespass convictions. The trial court noted that all of the convictions "involve either violence to some other person or damage to property or at the very least, a complete disregard for the property of other people, and a complete disregard for the rules of society." (Tr. 60). The trial judge also stated that Stewart violated probation and accumulated "numerous conduct incidents at the jail." *Id.* The instant crime indicates that the violence of Stewart's criminal activity is increasing. Stewart may not be the worst offender; however, the trial court did not sentence him to the maximum executed sentence that could be imposed under the plea agreement. Furthermore, even though he cooperated with the investigation and expressed remorse at the sentencing hearing, Stewart informed the investigating officer, "I don't have any remorse about killing [Johnson]." Tr. at 36.

In his appellant's brief, Stewart notes that he was only eighteen at the time he killed Johnson, that he had a history of mental illness, and that the trial judge

acknowledged that society had “failed” him. Tr. at 58. He classifies his sentence as the “maximum sentence” and claims that these mitigators were given no weight.

Even though Stewart was only eighteen at the time he killed Johnson, he was not a naïve teenager. He had spent time in state institutions, including jails, had been involved in many violent activities, and was apparently involved in the business of disseminating illegal drugs when he committed the killing.

A court of review examines four factors in determining the effect of a defendant’s mental illness: (1) the extent of the defendant’s inability to control his behavior due to the illness; (2) overall limitations on functioning caused by the illness; (3) the duration of the illness; and (4) the extent of any nexus between the illness and the commission of the crime. *See Biehl v. State*, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), *trans. denied*. A pre-sentencing report shows that at some point in his life Stewart suffered from Oppositional Defiant Syndrome, a condition for which he was prescribed medication and required to attend treatment programs. Stewart was terminated from the treatment programs because, without explanation, he stopped attending group and psychiatric sessions. There is no evidence of the extent of Stewart’s inability to control his anger, the limitations of his illness, or whether he was still ill at the time he committed the instant offense.

The trial judge stated that the system had failed in helping Stewart with his unspecified “emotional problems.” It is perhaps this failure that caused the trial judge to suspend ten years of Stewart’s sentence and to order that he obtain services while on probation.

### CONCLUSION

Stewart has failed to establish that his sentence is inappropriate under App.R.  
7(B).

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.